

***DRAFT***  
***October 17, 2002***

**PATTERN JURY INSTRUCTIONS  
FOR CASES OF  
EXCESSIVE FORCE  
IN VIOLATION OF THE  
FOURTH AND EIGHTH AMENDMENTS**

**FOR THE DISTRICT COURTS  
OF THE UNITED STATES COURT OF  
APPEALS FOR THE FIRST CIRCUIT**

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This is a draft of proposed Pattern Jury Instructions for Excessive Force cases prepared by Chief Judge Hornby's chambers. We invite feedback and suggestions on any aspect of these instructions. Although we believe that these pattern instructions will be helpful in crafting a jury charge, it bears emphasis that this version is simply a proposal. Neither the Court of Appeals nor any District Court within the circuit has in any way approved the use of these instructions.

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FOR CASES OF  
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**Pattern Jury Instruction****A. LIABILITY**

Federal law<sup>2</sup> provides that [plaintiff] may recover damages if [defendant],<sup>3</sup> acting under color of law, deprived [him/her] of a right guaranteed by the Constitution. The right at stake here is the right to be free from the use of excessive force. [The parties have agreed that [defendant] acted “under color” of law. The only issue for you, therefore, is the issue of excessive force.] You are not to determine the legality of the [e.g., subsequent arrest].

***(1) Definition of Excessive Force***

Every person has the constitutional right not to be subjected to unreasonable or excessive force by a law enforcement officer. On the other hand, in [making an investigatory traffic stop, making an arrest, etc.] an officer has the right to use such force as [he/she] reasonably believes is necessary under the circumstances to [complete the investigatory traffic stop, effectuate the arrest, etc.]. Whether or not the force used was unnecessary, unreasonable or excessively violent is an issue for you to decide on the basis of that degree of force that a reasonable and prudent law enforcement officer would have applied under the same circumstances disclosed in this case. The test of reasonableness requires careful attention to the facts and circumstances including, but not limited to, the severity of the [crime the officer was investigating, crime for which the arrest was made, etc.]; whether [plaintiff] posed an immediate threat to the safety of the officer or others; whether [he/she] was actively resisting the [investigatory traffic stop, arrest, etc.]; and the severity of any injury to [him/her].<sup>4</sup>

The “reasonableness” of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. With respect to a claim of excessive force, the standard of reasonableness at that moment applies. Not every push or shove, even if it may later seem unnecessary, violates the Constitution. The determination of reasonableness must allow for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain and rapidly evolving—about the amount of force that is necessary in a particular situation.

The “reasonableness” inquiry is an objective one. The question is whether an officer’s actions are “objectively reasonable” in light of all the facts and circumstances confronting [him/her], without regard to [his/her] underlying intent or motivation. Evil intentions will not make a constitutional violation out of an objectively reasonable use of force; and good intentions will not make an unreasonable use of force proper.

## ***(2) Elements of the Plaintiff's Claim***

In order to prove [his/her] claim of unconstitutionally excessive force, [plaintiff] must prove by a preponderance of the evidence the following:

That [defendant] intentionally, rather than negligently, used unconstitutionally excessive force as I have defined it. However, it is not necessary to find that [defendant] had any specific purpose or desire to deprive [plaintiff] of [his/her] constitutional rights in order to find in favor of [plaintiff]. [Plaintiff] must prove only that the *action* was deliberate, not that the *consequence* was intended. Mere negligence, however, is not sufficient. [Plaintiff] is entitled to relief if [defendant] intentionally acted in a manner that resulted in a violation of [plaintiff]'s constitutional rights.<sup>5</sup>

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<sup>1</sup> This instruction is only appropriate for use in cases governed by the Fourth Amendment. In excessive force cases, the applicable legal standard is determined “by identifying the specific constitutional right allegedly infringed by the challenged application of force.” Graham v. Connor, 490 U.S. 386, 394 (1989). “[A]ll claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard, rather than under a ‘substantive due process’ approach.” *Id.* at 395; accord Aponte Matos v. Toledo Davila, 135 F.3d 182, 191 (1st Cir. 1998). “A ‘seizure’ triggering the Fourth Amendment’s protections occurs only when government actors have, ‘by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen.’” Graham, 490 U.S. at 395 n.10 (citations omitted). Furthermore, it is not enough that the claim of excessive force “arises in the context of an arrest or investigatory stop” (i.e., injury to a bystander during a high speed chase); the allegedly excessive force must result from “an intentional acquisition of physical control” by the police. Landol-Rivera v. Cruz Cosme, 906 F.2d 791, 795 & n.8 (1st Cir. 1990).

The Eighth Amendment (which prohibits “the unnecessary and wanton infliction of pain”) governs claims of excessive force arising after a person has been convicted and while the person is in government custody. Hudson v. McMillian, 503 U.S. 1, 5 (1992); see also Davis v. Rennie, 264 F.3d 86, 98 n.9 (1st Cir. 2001) (“A convicted prisoner may bring a claim for use of excessive force under the Eighth Amendment” (citing Hudson, 503 U.S. at 4)). See Instructions 2.1 and 2.2 for Eighth Amendment excessive force claims.

The Supreme Court has not yet decided whether the Fourth or Eighth Amendments apply “at the point where arrest ends and pretrial detention begins,” but “[i]t is clear . . . that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment.” Graham, 490 U.S. at 395 n.10; see also Davis, 264 F.3d at 101-02 (citing cases where other courts have adopted or rejected the use of the Fourth Amendment “objectively reasonable” standard in pretrial detention and involuntary commitment situations); Brady v. Dill, 187 F.3d 104, 110 n.5 (1st Cir. 1999) (recognizing that this question is still open). The First Circuit has added that through the due process clause, “the standard to be applied is the same as that used in Eighth Amendment cases.” Burrell v. Hampshire County, No. 02-1504, 2002 WL 31218304, at \*5 (1st Cir. Oct. 4, 2002); Calderón-Ortiz v. Laboy-Alvarado, 300 F.3d 60, 64 (1st Cir. 2002) (pretrial detainees have protection “at least as great as the Eighth Amendment protections available to a convicted prisoner” (quoting City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983))).

<sup>2</sup> Although the notes accompanying these instructions generally cite section 1983 caselaw, these instructions should also be usable in excessive force cases against federal actors based on Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). See Graham v. Connor, 490 U.S. 386, 394 n.9 (1989) (while discussing the role of the Fourth Amendment in a section 1983 excessive force case, the Court noted that “[t]he same analysis applies to excessive force claims brought against federal law enforcement and correctional officials under [Bivens]”), cited in Abreu-Guzman v. Ford, 241 F.3d 69, 73 (1st Cir. 2001) (“The analysis of a qualified immunity defense is identical for actions brought under § 1983 and Bivens.”); see also Butz v. Economou, 438 U.S. 478, 496-505 (1978), cited in Laswell v. Brown, 683 (continued next page)

F.2d 261, 268 n.11 (1st Cir. 1982) (“The Butz case looked to 42 U.S.C. § 1983 cases to determine the correct nature of immunity of officials in suits based on Bivens. The same approach is appropriate with regard to the issue of whether respondeat superior is available in Bivens actions.” (internal citation omitted)); Wright v. Park, 5 F.3d 586, 591 (1st Cir. 1993) (“[A]bsent a specific statutory provision to the contrary, there is no principled basis for according state actors sued under 42 U.S.C. § 1983 a different degree of immunity than would be accorded federal actors sued for an identical abridgment of rights under Bivens.” (citing Butz, 438 U.S. at 500)).

<sup>3</sup> This instruction is drafted for cases where the plaintiff claims that the defendant personally inflicted the excessive force. A defendant may also be held liable “for his failure to intervene in appropriate circumstances to protect an arrestee from the excessive use of force by his fellow officers.” Wilson v. Town of Mendon, 294 F.3d 1, 6 (1st Cir. 2002). But an action for damages for violation of the Fourth Amendment is necessarily based on 42 U.S.C. § 1983, Graham v. Connor, 490 U.S. 386, 393-94 (1989), and section 1983 does not allow recovery on *respondeat superior* theories of liability. Voutour v. Vitale, 761 F.2d 812, 819 (1st Cir. 1985) (“The Supreme Court has firmly rejected *respondeat superior* as a basis for section 1983 liability of supervisory officials or municipalities.” (citing Monell v. Department of Soc. Servs., 436 U.S. 658, 691, 694 n.58 (1978))).

As a general rule, in order for a supervisor to be liable for a subordinate’s excessive force, there must be “an ‘affirmative link’ between the conduct of the supervisor and that of the employee.” Voutour, 761 F.2d at 820 (citing Rizzo v. Goode, 423 U.S. 362, 371 (1976)); accord Aponte Matos, 135 F.3d at 192. The “affirmative link must amount to ‘supervisory encouragement, condonation or acquiescence, or gross negligence amounting to deliberate indifference.’” Aponte Matos, 135 F.3d at 192 (citing Lipsett v. University of P.R., 864 F.2d 881, 902 (1st Cir. 1988)). Furthermore, this “affirmative link” must be substantiated with “proof that the supervisor’s conduct led inexorably to the constitutional violation.” Seekamp v. Michaud, 109 F.3d 802, 808 (1st Cir. 1997) (citing Hegarty v. Somerset County, 53 F.3d 1367, 1380 (1st Cir. 1995)).

This general rule actually encompasses two different types of supervisory liability, the liability of municipalities and the liability of individual supervisors, each of which is governed by a different definition of the type of “affirmative link” that is necessary. A municipal defendant is only liable if its policies or customs “evidence[] a ‘deliberate indifference’ to the rights of its inhabitants,” and “are the moving force behind the constitutional violation.” City of Canton, Ohio v. Harris, 489 U.S. 378, 389 (1989); see also Monell, 436 U.S. at 690 (“Local governing bodies ... can be sued directly under § 1983 ... where ... the action that is alleged to be unconstitutional implements, or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers.” (footnotes omitted)). A municipality’s policies and customs include not only formal, affirmative policies, but also inaction, such as a failure to properly train its police officers. City of Canton, 489 U.S. at 388-89; Town of Mendon, 294 F.3d at 6.

The liability of individual supervisors differs from that of municipalities in two respects. First, an individual supervisor may be liable not only for deliberate indifference to the rights of others, but also for reckless or callous indifference. Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 562 & n.8 (1st Cir. 1989). Second, an individual supervisor is liable for his or her acts or omissions; there is no need to demonstrate that those acts or omissions constituted a policy, pattern or custom. Id. at 567.

In either a municipal liability case or an individual supervisory liability case, it will be necessary to alter the language in the jury charge to reflect the particular nature of supervisory liability under section 1983. It is advisable to refer specifically to the “affirmative link” requirement, but such language is not strictly necessary. If worded appropriately, it may be sufficient to use standard proximate cause language. See id. at 569 (approving instruction that “informed the jury that there needed to be a causal connection between the acts or omissions of the supervisors and the unconstitutional activities of the officers,” even though it did not use ‘affirmative link’ language). But “[w]ithout a finding of a constitutional violation on the part of a municipal employee, there cannot be a finding of section 1983 damages liability on the part of the municipality.” Town of Mendon, 294 F.3d at 7.

In no event may a plaintiff sue a state directly under section 1983; such claims are barred by the Eleventh Amendment. Day v. Massachusetts Air Nat’l Guard, 167 F.3d 678, 686 (1st Cir. 1999) (citing Alabama v. Pugh, 438 U.S. 781, 782 (1978)).

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<sup>4</sup> Objective reasonableness is the standard. Graham v. Connor, 490 U.S. 386, 388 (1989); Alexis v. McDonald's Rests. of Mass., Inc., 67 F.3d 341, 352 (1st Cir. 1995). The factors that test reasonableness come from Graham, 490 U.S. at 396-97, and Bastien v. Goddard, 279 F.3d 10, 14-16 (1st Cir. 2002), where the First Circuit held that serious injury is *not* a prerequisite to an excessive force claim, but that it is a factor that may be considered.

<sup>5</sup> The instruction does not include a qualified immunity component. In Saucier v. Katz, 533 U.S. 194, 204-09 (2001), the United States Supreme Court held that the objective reasonableness inquiry of the Fourth Amendment, see Graham v. Connor, 490 U.S. 386 (1989), does not merge with the qualified immunity analysis under Anderson v. Creighton, 483 U.S. 635 (1987). Nevertheless, the First Circuit has said that: "Qualified immunity, which is a question of law, is an issue that is appropriately decided by the court during the early stages of the proceedings and should not be decided by the jury." Tatro v. Kervin, 41 F.3d 9, 15 (1st Cir. 1994). Although that pronouncement sounds definitive, the Tatro court went on to say in the next paragraph: "In any event, if a court does feel obligated to give the defendant[] the benefit of qualified immunity at the final stage of the trial, or, more appropriately, if it needs to resolve factual issues related to qualified immunity, it must do so without using potentially misleading language. . . ." Id. (citation omitted). That language suggests that at most an instruction might ask for specific findings from the jury such that the court can determine whether qualified immunity should apply.

In its decisions since Tatro, the First Circuit has consistently supported the principle of requiring the court to defer to the fact finder for the resolution of any "factual dispute underlying the qualified immunity defense." Kelley v. LaForce, 288 F.3d 1, 7 n.2 (1st Cir. 2002). In St. Hilaire v. City of Laconia, 71 F.3d 20 (1st Cir. 1995), the court said:

[I]f there is a factual dispute, that factual dispute must be resolved by a fact finder. The precise question of whether the judge may intercede and play that fact-finder role appears not to have been clearly decided by the Supreme Court. Some courts, consonant with the Seventh Amendment, have preserved the fact finding function of the jury through special interrogatories to the jury as to the disputes of fact, reserving the ultimate law question to the judge.

Id. at 24 n.1 (citations omitted); accord Finnegan v. Fountain, 915 F.2d 817, 821, 823-24 (2d Cir. 1990), rejected on other grounds by, Saucier, 533 U.S. at 204-05. Later, in Ringuette v. City of Fall River, 146 F.3d 1 (1st Cir. 1998), the court noted:

Something of a "black hole" exists in the law as to how to resolve factual disputes pertaining to qualified immunity when they cannot be resolved on summary judgment prior to trial. To avoid duplication, judges have sometimes deferred a decision until the trial testimony was in or even submitted the factual issues to the jury. In all events, the district judge's procedure here [making factual determinations based upon evidence presented to the jury], which is not challenged on appeal, seems to us to have been eminently sensible.

Id. at 6 (citations omitted). Most recently, after acknowledging that the Supreme Court had not "clearly indicated" what the judge's role should be, the First Circuit stated: "[W]hen facts are in dispute, 'we doubt the Supreme Court intended this dispute to be resolved from the bench by fiat.'" Kelley, 288 F.3d 1, 7 n.2 (quoting Prokey v. Watkins, 942 F.2d 67, 72 (1st Cir. 1991)).

**2.1 Excessive Force in Violation of the Eighth Amendment: Injury to an Inmate by a Corrections Officer<sup>1</sup>**

[Updated: 4/7/03]

**Pattern Jury Instruction**

**A. LIABILITY**

Federal law<sup>2</sup> provides that [plaintiff] may recover damages if [defendant],<sup>3</sup> acting under color of law, deprived [him/her] of a right guaranteed by the Constitution. The right at stake here is the right to be free from cruel and unusual punishment. [The parties have agreed that [defendant] acted “under color” of law. The only issue for you, therefore, is whether [defendant] subjected [plaintiff] to cruel and unusual punishment.]

***(1) Definition of Cruel and Unusual Punishment***

Inmates are protected from cruel and unusual punishment under the Eighth Amendment of the United States Constitution. In order to prove a violation under the Eighth Amendment, [plaintiff] must show that [defendant] unnecessarily and wantonly inflicted pain on [him/her].<sup>4</sup> A use of force against a prison inmate that was applied in a good faith effort to maintain or restore discipline is not “unnecessary and wanton,” but force applied maliciously or sadistically to cause harm is unnecessary and wanton.

***(2) Elements of Plaintiff’s Claim<sup>5</sup>***

In order to prove [his/her] claim, [plaintiff] must prove by a preponderance of the evidence the following:

First, that [defendant] used force against [him/her] maliciously and sadistically, for the purpose of causing harm;<sup>6</sup> and

Second, that [plaintiff] suffered some pain as a result of [defendant]’s use of force.

To act “maliciously” means intentionally to do a wrongful act without just cause or excuse, with the intent to inflict injury or under circumstances that show an evil intent.

To act “sadistically” means to engage in extreme or excessive cruelty or to take delight in acting cruelly.<sup>7</sup>

Some of the things you may want to consider in determining whether [defendant] unnecessarily and wantonly inflicted pain on [plaintiff] include: (1) the extent of the injury suffered, (2) the need for the application of force, (3) the relationship between the need for force and the amount of force used, (4) the threat reasonably perceived by [defendant], and (5) any efforts made to temper the severity of a forceful response. You should give prison officials deference in their adoption and execution of policies and

practices that in their good faith judgment are needed to preserve internal order and discipline and to maintain internal security in the prison.

<sup>1</sup> The Eighth Amendment only applies in cases involving penal detention. Substantive due process standards and restrictions apply in cases involving involuntarily committed mental patients. Youngberg v. Romeo, 457 U.S. 307, 315-16 (1982); Davis v. Rennie, 264 F.3d at 97-98. Similarly, other excessive force claims, where there has been no search, seizure, or detention, are also governed by the substantive due process standard. Cummings v. McIntire, 271 F.3d 341, 344 (1st Cir. 2001) (“The dispositive question in such an analysis is whether the challenged conduct was so extreme as to ‘shock the conscience.’”) (citing County of Sacramento v. Lewis, 523 U.S. 833, 843 (1998)). The Supreme Court has not yet decided whether the Fourth or Eighth Amendments apply “at the point where arrest ends and pretrial detention begins,” but “[i]t is clear . . . that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment.” Graham, 490 U.S. at 395 n.10; see also Davis, 264 F.3d at 101-02 (citing cases where other courts have adopted or rejected the use of the Fourth Amendment “objectively reasonable” standard in pretrial detention and involuntary commitment situations); Brady v. Dill, 187 F.3d 104, 110 n.5 (1st Cir. 1999) (recognizing that this question is still open). The First Circuit has added that through the due process clause, pretrial detainees have protection “at least as great as the Eighth Amendment protections available to a convicted prisoner.” Calderón-Ortiz v. Laboy-Alvarado, 300 F.3d 60, 64 (1st Cir. 2002) (quoting City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983)).

<sup>2</sup> Although the notes accompanying these instructions generally cite section 1983 caselaw, these instructions should also be usable in excessive force cases against federal actors based on Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). See Graham v. Connor, 490 U.S. 386, 394 n.9 (1989) (while discussing the role of the Fourth Amendment in a section 1983 excessive force case, the Court noted that “[t]he same analysis applies to excessive force claims brought against federal law enforcement and correctional officials under [Bivens]”), cited in Abreu-Guzman v. Ford, 241 F.3d 69, 73 (1st Cir. 2001) (“The analysis of a qualified immunity defense is identical for actions brought under § 1983 and Bivens.”); see also Butz v. Economou, 438 U.S. 478, 496-505 (1978), cited in Laswell v. Brown, 683 F.2d 261, 268 n.11 (1st Cir. 1982) (“The Butz case looked to 42 U.S.C. § 1983 cases to determine the correct nature of immunity of officials in suits based on Bivens. The same approach is appropriate with regard to the issue of whether respondeat superior is available in Bivens actions.” (internal citation omitted)); Wright v. Park, 5 F.3d 586, 591 (1st Cir. 1993) (“[A]bsent a specific statutory provision to the contrary, there is no principled basis for according state actors sued under 42 U.S.C. § 1983 a different degree of immunity than would be accorded federal actors sued for an identical abridgment of rights under Bivens.” (citing Butz, 438 U.S. at 500)).

<sup>3</sup> This instruction is drafted for cases where the plaintiff claims that the defendant personally inflicted the excessive force. A defendant may also be held liable “for his failure to intervene in appropriate circumstances to protect an arrestee from the excessive use of force by his fellow officers.” Wilson v. Town of Mendon, 294 F.3d 1, 6 (1st Cir. 2002). But an action for damages for violation of the Fourth Amendment is necessarily based on 42 U.S.C. § 1983, Graham v. Connor, 490 U.S. 386, 393-94 (1989), and section 1983 does not allow recovery on *respondeat superior* theories of liability. Voutour v. Vitale, 761 F.2d 812, 819 (1st Cir. 1985) (“The Supreme Court has firmly rejected *respondeat superior* as a basis for section 1983 liability of supervisory officials or municipalities.” (citing Monell v. Department of Soc. Servs., 436 U.S. 658, 691, 694 n.58 (1978))).

As a general rule, in order for a supervisor to be liable for a subordinate’s excessive force, there must be “an ‘affirmative link’ between the conduct of the supervisor and that of the employee.” Voutour, 761 F.2d at 820 (citing Rizzo v. Goode, 423 U.S. 362, 371 (1976)); accord Aponte Matos, 135 F.3d at 192. The “affirmative link must amount to ‘supervisory encouragement, condonation or acquiescence, or gross negligence amounting to deliberate indifference.’” Aponte Matos, 135 F.3d at 192 (citing Lipsett v. University of P.R., 864 F.2d 881, 902 (1st Cir. 1988)). Furthermore, this “affirmative link” must be substantiated with “proof that the supervisor’s conduct led inexorably to the constitutional violation.” Seekamp v. Michaud, 109 F.3d 802, 808 (1st Cir. 1997) (citing Hegarty v. Somerset County, 53 F.3d 1367, 1380 (1st Cir. 1995)).

This general rule actually encompasses two different types of supervisory liability, the liability of municipalities and the liability of individual supervisors, each of which is governed by a different definition (continued next page)



of the type of “affirmative link” that is necessary. A municipal defendant is only liable if its policies or customs “evidence[] a ‘deliberate indifference’ to the rights of its inhabitants,” and “are the moving force behind the constitutional violation.” City of Canton, Ohio v. Harris, 489 U.S. 378, 389 (1989); see also Monell, 436 U.S. at 690 (“Local governing bodies ... can be sued directly under § 1983 ... where ... the action that is alleged to be unconstitutional implements, or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers.” (footnotes omitted)). A municipality’s policies and customs include not only formal, affirmative policies, but also inaction, such as a failure to properly train its police officers. City of Canton, 489 U.S. at 388-89; Town of Mendon, 294 F.3d at 6.

The liability of individual supervisors differs from that of municipalities in two respects. First, an individual supervisor may be liable not only for deliberate indifference to the rights of others, but also for reckless or callous indifference. Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 562 & n.8 (1st Cir. 1989). Second, an individual supervisor is liable for his or her acts or omissions; there is no need to demonstrate that those acts or omissions constituted a policy, pattern or custom. Id. at 567.

In either a municipal liability case or an individual supervisory liability case, it will be necessary to alter the language in the jury charge to reflect the particular nature of supervisory liability under section 1983. It is advisable to refer specifically to the “affirmative link” requirement, but such language is not strictly necessary. If worded appropriately, it may be sufficient to use standard proximate cause language. See id. at 569 (approving instruction that “informed the jury that there needed to be a causal connection between the acts or omissions of the supervisors and the unconstitutional activities of the officers,” even though it did not use ‘affirmative link’ language). But “[w]ithout a finding of a constitutional violation on the part of a municipal employee, there cannot be a finding of section 1983 damages liability on the part of the municipality.” Town of Mendon, 294 F.3d at 7.

In no event may a plaintiff sue a state directly under section 1983; such claims are barred by the Eleventh Amendment. Day v. Massachusetts Air Nat’l Guard, 167 F.3d 678, 686 (1st Cir. 1999) (citing Alabama v. Pugh, 438 U.S. 781, 782 (1978)).

<sup>4</sup> The Supreme Court sometimes uses the term “pain” and sometimes the term “harm.” Probably in most cases any distinction between the two is academic. Our best reading of the cases, however, is that actual infliction of *pain* is a necessary precondition to recovery; the defendant’s *intent*, however, must be to cause “harm,” which is arguably broader than or different from “pain.” See Wilson v. Seiter, 501 U.S. 294, 297, 302 (1991) (“only the ‘unnecessary and wanton infliction of pain’ implicates the Eighth Amendment”; “wantonness consisted of acting ‘maliciously and sadistically for the purpose of causing harm.’”); accord Hudson v. McMillian, 503 U.S. 1, 5-7 (1992); Whitley v. Albers, 475 U.S. 312, 319-21 (1986). The First Circuit has not addressed any distinction between the terms. The Eighth Circuit seems clear that infliction of *pain* is a precondition to recovery. Cowans v. Wyrick, 862 F.2d 697, 699, 700 (8th Cir. 1988) (“Pain, misery, anguish or similar harm”); see also Bolin v. Black, 875 F.2d 1343, 1349-50 (8th Cir. 1989).

<sup>5</sup> This instruction does not include a qualified immunity component. See Instruction 1.1 Note 5 for a discussion of the jury’s role in answering the question of qualified immunity.

<sup>6</sup> This instruction is based upon Hudson v. McMillian, 503 U.S. 1, 6-7 (1992), extending the “‘unnecessary and wanton infliction of pain’ standard to all allegations of excessive force.” (The First Circuit arguably still treats prison riots as distinct, see Torres-Viera v. Laboy-Alvarado, 311 F.3d 105, 107 (1st Cir. 2002), but Hudson seems quite clear in stating that the analysis is the same “whenever guards use force to bring order . . . [w]hether the prison disturbance is a riot or a lesser disruption.” 503 U.S. at 6.

Hudson held that the absence of serious injury does not foreclose recovery, but it is “one factor that may suggest ‘whether the use of force could plausibly have been thought necessary’ in a particular situation, or ‘instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur.’” Id. at 7. On the other hand, a *de minimis* use of force is not covered unless it is “repugnant to the conscience of mankind.” Id. at 9-10.

Hudson drew a bright line between excessive force claims and conditions of confinement claims with respect to the types of injury and *mens rea* required. In a conditions of confinement claim the plaintiff must have suffered a “significant injury,” while an excessive force plaintiff need not have. Id. at 8-9. On the other hand, an excessive force plaintiff must prove that a guard acted “maliciously and sadistically to cause harm,” while a conditions of confinement plaintiff need only establish that a guard acted with “deliberate indifference.” Id. at 7-8. However, it may not always be clear whether a particular claim is for  
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excessive force or conditions of confinement. For example, in Hope v. Pelzer, 122 S. Ct. 2508 (2002), a recent case involving Alabama's practice of punishing prisoners by handcuffing them to a hitching post for a prolonged period of time, the Court used the second test without explaining why the challenged conduct should be considered a condition of confinement rather than the use of excessive force. Moreover, this distinction is not necessarily valid beyond the issues of *mens rea* and proof of harm. In Porter v. Nussle, 534 U.S. 516, 122 S. Ct. 983, 990 (2002), the Court affirmed the utility of the distinction as drawn in Hudson, but declined to differentiate between the two types of claims with respect to the exhaustion of administrative remedies requirement of 42 U.S.C. § 1997e(a) (1994 ed., Supp. V).

<sup>7</sup> See Howard v. Barnett, 21 F.3d 868, 872 (8th Cir. 1994) ("one acts 'sadistically' by engaging in extreme or excessive cruelty or by delighting in cruelty").

## 2.2 Excessive Force in Violation of the Eighth Amendment: Liability of Corrections Officer for Injury by Other Inmates<sup>1</sup>

[Updated: 8/26/02]

### **Pattern Jury Instruction**

#### **A. LIABILITY**

Federal law<sup>2</sup> provides that [plaintiff] may recover damages if [defendant], acting under color of law, deprived [him/her] of a right guaranteed by the Constitution. The right at stake here is the right to be free from cruel and unusual punishment. [The parties have agreed that [defendant] acted “under color” of law. The only issue for you, therefore, is whether [defendant] subjected [plaintiff] to cruel and unusual punishment.]

##### ***(1) Definition of Cruel and Unusual Punishment***

The constitutional protection against cruel and unusual punishment requires prison officials to provide humane conditions of confinement and to take reasonable measures to guarantee the safety of the inmates, including reasonable measures to protect them from violence at the hands of other prisoners. However, not every injury suffered by a prisoner at the hands of a fellow inmate gives rise to a cruel and unusual punishment claim against a corrections officer.

##### ***(2) Elements of Plaintiff's Claim***

In order to prove [his/her] claim of unconstitutionally excessive force against the corrections officer, [plaintiff] must prove by a preponderance of the evidence the following:

First, that the risk of violence was objectively serious—in other words, that it posed a substantial risk of serious harm;

Second, that, as a prison official, [defendant] was deliberately indifferent to the risk of violence to [plaintiff]; and

Third, that but for [defendant]’s deliberate indifference to the risk, [plaintiff] would not have been harmed.

To prove that [defendant] was deliberately indifferent, [plaintiff] must prove that [defendant] was more than negligent. [He/She] must prove that [defendant] actually knew of a substantial risk to [plaintiff]’s health or safety, and that [defendant] disregarded it. If you find that [defendant] knew of a substantial risk to [plaintiff]’s health or safety but responded reasonably to that risk under all the circumstances, [defendant] is not liable even if [plaintiff] was harmed.

Bear in mind that knowledge or lack of knowledge often cannot be proven directly because there is no way of directly scrutinizing the workings of the human mind. But you may consider all the facts and circumstances and draw those inferences you find are reasonable in light of experience.

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<sup>1</sup> This instruction is based upon Giroux v. Somerset County, 178 F.3d 28 (1st Cir. 1999), and Farmer v. Brennan, 511 U.S. 825 (1994). The Eighth Amendment only applies in cases involving penal detention. Substantive due process standards and restrictions apply in cases involving involuntarily committed mental patients. Youngberg v. Romeo, 457 U.S. 307, 315-16 (1982); Davis v. Rennie, 264 F.3d at 97-98. Similarly, other excessive force claims, where there has been no search, seizure, or detention, are also governed by the substantive due process standard. Cummings v. McIntire, 271 F.3d 341, 344 (1st Cir. 2001) (“The dispositive question in such an analysis is whether the challenged conduct was so extreme as to ‘shock the conscience.’”) (citing County of Sacramento v. Lewis, 523 U.S. 833, 843 (1998)). The Supreme Court has not yet decided whether the Fourth or Eighth Amendments apply “at the point where arrest ends and pretrial detention begins,” but “[i]t is clear . . . that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment.” Graham, 490 U.S. at 395 n.10; see also Davis, 264 F.3d at 101-02 (citing cases where other courts have adopted or rejected the use of the Fourth Amendment “objectively reasonable” standard in pretrial detention and involuntary commitment situations); Brady v. Dill, 187 F.3d 104, 110 n.5 (1st Cir. 1999) (recognizing that this question is still open). The First Circuit has added that through the due process clause, pretrial detainees have protection “at least as great as the Eighth Amendment protections available to a convicted prisoner.” Calderón-Ortiz v. Laboy-Alvarado, 300 F.3d 60, 64 (1st Cir. 2002) (quoting City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983)). It then proceeded to analyze the elements of liability in the pretrial detention context as if they were the same.

<sup>2</sup> Although the notes accompanying these instructions generally cite section 1983 caselaw, these instructions should also be usable in excessive force cases against federal actors based on Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). See Graham v. Connor, 490 U.S. 386, 394 n.9 (1989) (while discussing the role of the Fourth Amendment in a section 1983 excessive force case, the Court noted that “[t]he same analysis applies to excessive force claims brought against federal law enforcement and correctional officials under [Bivens]”, cited in Abreu-Guzman v. Ford, 241 F.3d 69, 73 (1st Cir. 2001) (“The analysis of a qualified immunity defense is identical for actions brought under § 1983 and Bivens.”); see also Butz v. Economou, 438 U.S. 478, 496-505 (1978), cited in Laswell v. Brown, 683 F.2d 261, 268 n.11 (1st Cir. 1982) (“The Butz case looked to 42 U.S.C. § 1983 cases to determine the correct nature of immunity of officials in suits based on Bivens. The same approach is appropriate with regard to the issue of whether respondeat superior is available in Bivens actions.” (internal citation omitted)); Wright v. Park, 5 F.3d 586, 591 (1st Cir. 1993) (“[A]bsent a specific statutory provision to the contrary, there is no principled basis for according state actors sued under 42 U.S.C. § 1983 a different degree of immunity than would be accorded federal actors sued for an identical abridgment of rights under Bivens.” (citing Butz, 438 U.S. at 500)).

### 3.1 Excessive Force—Compensatory Damages

[Updated: 6/14/02]

#### **Pattern Jury Instruction**

If you find that [defendant] used excessive force against [plaintiff], and thereby caused damages to [him/her], you will then assess an amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all [plaintiff]’s damages caused by that conduct. Compensatory damages are not allowed as a punishment and cannot be imposed or increased to penalize [defendant]. You may award only such damages as you find by a preponderance of the evidence to have been caused by unconstitutionally excessive force as I have defined it. It is not necessary for [plaintiff] to prove the amount of [his/her] damages with certainty. On the other hand, [plaintiff] is not to be awarded purely speculative damages. <sup>1</sup>{If you should award damages, they will not be subject to federal or state income taxes, and you should therefore not consider such taxes in determining the amount of damages.}

<sup>2</sup>{[Plaintiff] has the duty to mitigate [her/his] damages—that is, to take reasonable steps that would reduce the damages. If [she/he] fails to do so, then [she/he] is not entitled to recover any damages that [she/he] could reasonably have avoided incurring. [Defendant] has the burden of proving by a preponderance of the evidence that [plaintiff] failed to take such reasonable steps.}

<sup>3</sup>{ If you find that [plaintiff] is entitled to damages for losses that will occur in the future, you will have to reduce this amount, whatever it may be, to its present worth. The reason for this is that a sum of money that is received today is worth more than the same money paid out in installments over a period of time since a lump sum today, such as any amount you might award in your verdict, can be invested and earn interest in the years ahead.

You have heard testimony concerning the likelihood of future inflation and what rate of interest any lump sum could return. In determining the present lump sum value of any future earnings you conclude [plaintiff] has lost or future damages [plaintiff] will suffer, you should consider only a rate of interest based on the best and safest investments, not the general stock market, and you may set off against it a reasonable rate of inflation.}<sup>4</sup>

The elements of damages that you may consider are as follows:

1. Reasonable past and future medical expenses incurred by [plaintiff] in securing treatment for injuries caused by [defendant]’s conduct.
2. An amount for any pain and suffering, emotional distress and humiliation that you find from the evidence [plaintiff] endured or will endure as a result of the excessive force. Even though it is obviously difficult to establish a standard of measurement for this element, that difficulty is not grounds for denying recovery. You must, therefore, make the best and most reasonable estimate you can, not from a personal

point of view but from a fair and impartial point of view of the amount of pain and suffering, emotional distress and humiliation that [plaintiff] incurred or will incur as a result of the excessive force and you must place a money value on this, attempting to come to a conclusion that will be fair and just to the parties. This will be difficult for you to measure in terms of dollars and cents, but there is no other rule I can give you for assessing this element of damages.

3. If you find that [plaintiff] has proven by a preponderance of the evidence that [defendant] violated [his/her] constitutional rights but that [he/she] has not proven any actual injury caused by the violation, you must nevertheless award [plaintiff] nominal or token damages such as One Dollar (\$1) or some other minimal amount.<sup>5</sup> This is so because the law recognizes that the denial of constitutional rights is itself an injury that should be recognized without regard to whether actual damages have been proven.

<sup>6</sup>{4. You may also award [plaintiff] prejudgment interest in an amount that you determine is appropriate to make [her/him] whole and to compensate [her/him] for the time between when [she/he] was injured and the day of your verdict. It is entirely up to you to determine the appropriate rate and amount of any prejudgment interest you decide to award.}

Now the fact that I have given you instructions concerning the determination of damages does not mean that I believe damages should be awarded or that they should not be awarded. I have given these damage instructions simply to assist in your deliberations if you should reach that issue. The decision remains yours as to whether or not [plaintiff] shall recover any damages against [defendant].

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<sup>1</sup> Although the First Circuit has not yet addressed this issue, those circuits that have addressed it have concluded that section 1983 damages are not taxable, even if they are calculated based on types of injury (e.g., lost wages) that would be taxable in another context. Wulf v. City of Wichita, 883 F.2d 842, 871-75 (10th Cir. 1989) (examining decisions by the Third, Fourth and Ninth circuits); Johnston v. Harris County Flood Control Dist., 869 F.2d 1565, 1579-80 (5th Cir. 1989). Therefore, this bracketed sentence may be used in cases where the tax consequences of the jury's award could be an issue.

<sup>2</sup> This bracketed paragraph may be used in cases where the plaintiff's duty to mitigate damages is an issue. Although the First Circuit has not addressed the issue of mitigation in a section 1983 case, those circuits that have addressed the issue have applied the general rule that a plaintiff has a duty to mitigate his or her damages. McClure v. Independent Sch. Dist. No. 16, 228 F.3d 1205, 1214 (10th Cir. 2000); Meyers v. City of Cincinnati, 14 F.3d 1115, 1119 (6th Cir. 1994); Johnston v. Harris County Flood Control Dist., 869 F.2d 1565, 1578-80 (5th Cir. 1989); see also Audio Odyssey, Ltd. v. Brenton First Nat'l Bank, 245 F.3d 721, 739 (8th Cir. 2001); Murphy v. City of Flagler Beach, 846 F.2d 1306, 1308-09 (11th Cir. 1988).

<sup>3</sup> These bracketed paragraphs may be used in cases where the plaintiff's claimed damages include future losses. Although the First Circuit has not yet addressed this issue, those circuits that have addressed it have held that section 1983 awards that include future damages must be reduced to present value. Chonich v. Wayne County Cmty. Coll., 874 F.2d 359, 369-70 (6th Cir. 1989) ("[A]n award of future damages must be reduced to present value in order to take into account the earning power of the money."); see also Gierlinger v. Gleason, 160 F.3d 858, 874 (2d Cir. 1998) (noting without comment that jury was instructed to reduce to present value any award of future damages).

<sup>4</sup> "The discount rate should be based on the rate of interest that would be earned on the 'best and safest investments.'" Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 537 (1983) (quoting Chesapeake & (continued next page)

Ohio Ry. Co. v. Kelly, 241 U.S. 485, 491 (1916)). The “best and safest investments” are those which provide a “risk-free stream of future income,” not those made by “investors who are willing to accept some risk of default.” Pfeifer, 462 U.S. at 537; Kelly, 241 U.S. at 490-91.

<sup>5</sup> In Memphis Community School District v. Stachura, 477 U.S. 299, 306 (1986), the Supreme Court stated that “the level of damages is ordinarily determined according to principles derived from the common law of torts.” The Court held that the jury could not be instructed to evaluate the importance of the constitutional right in setting the amount of a damage award and described its holding in Carey v. Piphus, 435 U.S. 247, 264 (1978), as being that “no compensatory damages could be awarded for violation of that right absent proof of actual injury.” Memphis, 477 U.S. at 308. In Memphis, the Court went on to say in a footnote that “nominal damages, and not damages based on some undefinable ‘value’ of infringed rights, are the appropriate means of ‘vindicating’ rights whose deprivation has not caused actual, provable injury.” Id. at 308 n.11.

<sup>6</sup> This bracketed paragraph may be used in cases where the plaintiff requests prejudgment interest. The rule in the First Circuit is that, in a section 1983 case, “it is the jury that must decide whether prejudgment interest is warranted.” Foley v. City of Lowell, Mass., 948 F.2d 10, 17 (1st Cir. 1991); accord Cordero v. De Jesus-Mendez, 922 F.2d 11, 13 (1st Cir. 1990) (“There can be no doubt that in this circuit the decision to award prejudgment interest in a federal question case lies within the sole province and discretion of the jury.”); id. (“[I]n an action brought under 42 U.S.C. § 1983, the issue of prejudgment interest is so closely allied with the issue of damages that federal law dictates that the jury should decide whether to assess it.”) (citing Furtado v. Bishop, 604 F.2d 80, 97-98 (1st Cir. 1979)). But see Gierlinger v. Gleason, 160 F.3d 858, 873-74 (2d Cir. 1998) (“In a suit to enforce a federal right, the question of whether or not to award prejudgment interest is ordinarily left to the discretion of the district court. . .”). If a section 1983 plaintiff fails to ask the jury for prejudgment interest, he or she may not later ask the judge to award it. Foley, 948 F.2d at 17; Cordero, 922 F.2d at 13.

## 4.1 Excessive Force—Punitive Damages

[Updated: 6/14/02]

### **Pattern Jury Instructions**

If you find that [defendant] is liable, you may also award punitive damages to [plaintiff] under some circumstances. To obtain punitive damages, [plaintiff] must prove by a preponderance of the evidence that [defendant] either knew that [his/her] actions violated federal law or acted in reckless or callous indifference to that risk.<sup>1</sup> If [plaintiff] satisfies this requirement, it is entirely up to you whether or not to award punitive damages.

If you decide to award punitive damages, the amount to be awarded is also within your sound discretion. The purpose of a punitive damage award is to punish a defendant or deter a defendant and others from similar conduct in the future. Factors you may consider include, but are not limited to, the nature of the conduct (how reprehensible or blameworthy was it), the impact of that conduct on [plaintiff], the ratio between the actual compensatory damages and the punitive damages, the relationship between [plaintiff] and [defendant], the likelihood that [defendant] or others would repeat the conduct if the punitive award is not made, and any other circumstances shown by the evidence, including any mitigating or extenuating circumstances that bear on the question of the size of such an award.<sup>2</sup>

<sup>3</sup>{Respondeat Superior}

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<sup>1</sup> In Smith v. Wade, 461 U.S. 30, 56 (1983), the Supreme Court set forth the requirements for a punitive damage award in a section 1983 case: the plaintiff must prove that the defendant had “evil motive or intent” or “reckless or callous indifference to the federally protected rights of others.” Drawing upon statements in Kolstad v. American Dental Ass’n, 527 U.S. 526, 535 (1999) (an employment discrimination decision under Title VII, which has a statutory provision for punitive damages), the First Circuit has concluded that the focus is the same under either alternative—namely, the knowledge of federal law. DiMarco-Zappa v. Cabanillas, 238 F.3d 25, 37-38 (1st Cir. 2001) (emphasis added; internal citations, quotations, and footnote omitted):

Punitive damages may be awarded under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others. Such indifference pertains to the defendant's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination. Although evidence of egregious or outrageous acts may support an inference of the requisite evil motive, *the guiding inquiry is whether the defendant acted in the face of a perceived risk that his actions will violate federal law.*

Accord Iacobucci v. Boulter, 193 F.3d 14, 26 (1st Cir. 1999) (citations omitted; alterations in original):

The special showing needed to trigger eligibility for punitive damages, which the Smith Court called “evil motive” or “reckless or callous indifference” pertains to the defendant’s “knowledge that [he] may be acting in violation of federal law, not [his] awareness that [he] is engaging in discrimination.” Thus, the standard requires proof that the defendant acted “in the face of a perceived risk that [his] actions

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[would] violate federal law.”

see also *id.* at 25 n.7 (“The [*Kolstad*] Court therefore interpreted the relevant statutory terms [of section 1981a] in lockstep with its understanding of the parallel language in *Smith*. Consequently, we believe that *Kolstad*’s teachings are fully applicable to punitive damages under section 1983.” (citations omitted)); *Davis v. Rennie*, 264 F.3d 86, 115-16 (1st Cir. 2001) (citing *Iacobucci*). Therefore, if there was any remaining basis for a punitive damage award in a non-employment case based on “evil motive or intent” apart from the *Kolstad* definition geared to knowledge of federal law, it has been laid to rest in the First Circuit.

<sup>2</sup> The Supreme Court upheld a state law punitive damage instruction and verdict in 1991 in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 18 (1991), with the following cautionary observation: “One must concede that unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one’s constitutional sensibilities.” The Court proceeded to say that “general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus.” *Id.* It upheld the punitive damage verdict in *Haslip* after careful review of the jury instructions, noting that “the trial court expressly described for the jury the purpose of punitive damages, namely ‘not to compensate the plaintiff for any injury’ but ‘to punish the defendant’ and ‘for the added purpose of protecting the public by [detering] the defendant and others from doing such wrong in the future.’” *Id.* at 19 (alterations in original). The Court specifically pointed out, but did not indicate whether it was determinative, that “[a]ny evidence of [the defendant’s] wealth was excluded from the trial in accord with Alabama law.” *Id.* The Court recognized that the jury instruction:

gave the jury significant discretion in its determination of punitive damages. But that discretion was not unlimited. It was confined to deterrence and retribution, the state policy concerns sought to be advanced. And if punitive damages were to be awarded, the jury “must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong.” The instructions thus enlightened the jury as to the punitive damages’ nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory.

That was sufficient, given the post-trial procedures that Alabama provided for scrutinizing punitive awards where, after trial, trial or appellate judges review the culpability of the conduct, the desirability of discouraging others, the impact upon parties and other factors such as the impact on innocent third parties. *Id.* at 20-21. The Supreme Court explicitly declined to impose the clear and convincing evidence standard for punitive damages and upheld Alabama’s lesser standard (“reasonably satisfied from the evidence”). *Id.* at 23 n.11. We have tried to incorporate the *Haslip* criteria, such as they are, into this instruction.

In her dissent, Justice O’Connor went further:

States routinely authorize civil juries to impose punitive damages without providing them any meaningful instructions on how to do so. Rarely is a jury told anything more specific than “do what you think best.”

In my view, such instructions are so fraught with uncertainty that they defy rational implementation. Instead, they encourage inconsistent and unpredictable results by inviting juries to rely on private beliefs and personal predilections. Juries are permitted to target unpopular defendants, penalize unorthodox or controversial views, and redistribute wealth. Multimillion dollars losses are inflicted on a whim. While I do not question the general legitimacy of punitive damages, I see a strong need to provide juries with standards to constrain their discretion so they may exercise their power wisely, not capriciously or maliciously. The Constitution requires as much.

*Id.* at 42-43 (internal citations omitted). Justice O’Connor found the trial court’s jury instructions in *Haslip* wanting; they “provided no meaningful standards to guide the jury’s decision to impose punitive damages  
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or to fix the amount. Accordingly, these instructions were void for vagueness.” *Id.* at 43. And even if they were not unconstitutionally vague, “they plainly offered less guidance than is required under the due process test.” *Id.* Finally, she concluded that post-verdict judicial review “is incapable of curing a grant of standardless discretion to the jury.” *Id.* Justice O’Connor did quote from the Alabama Supreme Court’s list of seven factors “that it considers relevant to the size of a punitive damages award” and said that those seven standards “could assist juries to make fair, rational decisions.” *Id.* at 51-52. The seven factors were:

- (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant’s conduct as well as to the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.
- (2) The degree of reprehensibility of the defendant’s conduct should be considered. The duration of this conduct, the degree of the defendant’s awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or “cover-up” of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of reprehensibility.
- (3) If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss.
- (4) The financial position of the defendant would be relevant.
- (5) All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.
- (6) If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award.
- (7) If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award.

*Id.* (quoting Green Oil Co. v. Hornsby, 539 So. 2d 218, 223-24 (Ala. 1989)). We have not tried to incorporate factors (3) through (7) into this instruction.

Justice O’Connor reiterated her concerns in TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 472 (1993) (dissent). She said there that:

juries sometimes receive only vague and amorphous guidance. Jurors may be told that punitive damages are imposed to punish and deter, but rarely are they instructed on how to effectuate those goals or whether any limiting principles exist. Although this Court has not held such instructions constitutionally inadequate, it cannot be denied that the lack of clear guidance heightens the risk that arbitrariness, passion, or bias will replace dispassionate deliberation as the basis for the jury’s verdict.

*Id.* at 474-75. Justice O’Connor expressed concern that unlike the jury instructions in Haslip, the instructions in TXO “specifically directed the jury to take TXO’s wealth into account.” *Id.* at 489. She was not willing to “say that consideration of a defendant’s wealth is unconstitutional,” *id.* at 491, but found the risk of prejudice “especially grave” where the jury was told of the out-of-state defendant’s extraordinary resources estimated at \$2 billion and the primary plaintiffs’ residence in the forum state. *Id.* at 492-93. Given the repeated emphasis on these factors in the plaintiffs’ closing arguments, Justice O’Connor found it “likely, if not inescapable, that the jury was influenced unduly by TXO’s out-of-state status and its large resources.” *Id.* at 495.

The general focus of other recent Supreme Court cases on the topic of punitive damages, Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001); BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996); Honda Motors Co. v. Oberg, 512 U.S. 415 (1994); Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989); Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988), has been on the standards of appellate review for punitive damage awards, not the

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standards (if any) that should guide jurors. Appellate courts are instructed to consider “(1) the degree of the defendant’s reprehensibility or culpability; (2) the relationship between the penalty and the harm to the victim caused by the defendant’s actions; and (3) the sanctions imposed in other cases for comparable misconduct.” Leatherman, 532 U.S. at 425 (citations omitted); accord BMW, 517 U.S. at 574-75. As the First Circuit noted in Zimmerman v. Direct Federal Credit Union, 262 F.3d 70 (1st Cir. 2001):

BMW furnishes three general guideposts for conducting such a review:

- (1) What is the degree of reprehensibility of the defendant's conduct?
- (2) What is the ratio between the compensatory and punitive damages?
- (3) What is the difference between the punitive damage award and the civil penalties imposed for comparable conduct?

Id. at 81 (citing BMW, 517 U.S. at 575). The first two standards are reflected in the jury instruction. We have not incorporated the third—the sanctions imposed in other cases—on the reasoning that it is more a subject for judicial, not jury, determination. In theory, however, evidence could be presented to a jury concerning sanctions imposed in other cases.

With all the attention the Supreme Court has given to the constitutionality of punitive damages under state law, apart from Kolstad v. American Dental Ass’n, 527 U.S. 526 (1999), it has had little, if anything, to say about the standards used in federal law cases either as a matter of constitutional law or under its supervisory powers.

<sup>3</sup> Because a defendant may not be held liable in a section 1983 case on a theory of *respondeat superior*, see Instruction 1.1 n.3; Instruction 2.1 n.3, this instruction does not include provisions similar to those used in Title VII cases concerning the scope of an employee’s employment or an employer’s good-faith efforts to comply with federal law.